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(SHDKT) PROCEEDINGS AND ORDERS DATE: 111684

CASE NBR 83-1-01643 CFY CASE STATUS: DECIDED
SHORT TITLE Borchardt, Ira E. DOCKETED: Mar 26 1984
VERSUS United States

Entry	Date	Note	Proceedings and Orders
1	Mar 26 1984	D	Petition for writ of certiorari filed.
3	May 7 1984		Order extending time to file response to petition until May 30, 1984.
4	May 30 1984		Order further extending time to file response to petition until June 13, 1984.
5	Jun 12 1984		Order further extending time to file response to petition until June 27, 1984.
6	Jun 27 1984		DISTRIBUTED. September 24, 1984
7	Jun 26 1984	X	Brief of respondent United States in opposition filed.
9	Oct 1 1984		Record filed.
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11	Oct 1 1984		REDISTRIBUTED. October 5, 1984
13	Oct 18 1984		REDISTRIBUTED. October 26, 1984
14	Oct 29 1984		Petition DENIED. Dissenting opinion by Justice Brennan

CONTINUE (

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14	Oct 29 1984		Petition DENIED. Dissenting opinion by Justice Brennan with whom Justice Marshall joins. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

83 - 1643

Office - Supreme Court, U.S.
FILED
MAR 28 1984
ALEXANDER L. STEVAS,
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

IRA EUGENE BORCHARDT,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to

The United States Court of Appeals

For the Fifth Circuit

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IRA EUGENE BORCHARDT

57 pp

QUESTION PRESENTED FOR REVIEW

1. May the United States pursue multiple trials for the various closely related statutory violations occurring in a single conspiracy without violating the double jeopardy provisions of the Fifth Amendment?

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NO. _____

IN THE

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IRA EUGENE BORCHARDT,

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versus

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to The United States Court of Appeals For the Fifth Circuit

---

Petitioner, IRA EUGENE BORCHARDT, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered on December 20, 1983.

THE OPINION BELOW

The original opinion of the Court of Appeals for the Fifth Circuit was rendered on December 20, 1983, and is not to be published; Panel Rehearing and Rehearing En Banc were denied on January 26, 1984. A copy of the opinion is appended hereto.

JURISDICTION

Grounds on which jurisdiction of the Supreme Court is invoked:

A. The Court of Appeals for the Fifth Circuit rendered its opinion on December 20, 1983.

B. Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc were denied on January 26, 1984.

C. The Supreme Court has

jurisdiction herein by reason of 28 USC §1254(a).

QUESTION PRESENTED FOR REVIEW

I. May the United States pursue multiple trials for the various closely related statutory violations occurring in a single drug conspiracy without violating the double jeopardy provisions of the Fifth Amendment?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

** * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb* * **

Title 21 USC §952(a), 963 (1970) are reprinted in pertinent part in the

appendix.

Title 31 USC §§1101, 1059 (1976) are reprinted in pertinent part in the appendix.

STATEMENT OF THE CASE

Ira Eugene Borchardt, Petitioner, was indicted and convicted in the U.S. District Court for the Northern District of Texas, Dallas Division on two counts of violating the currency laws, 31 USC §1101, 1059 and one count of possession of cocaine in violation of 21 USC §844(a). Prior to this trial in the Northern District of Texas, Petitioner was indicted and convicted in the United States District Court for the Southern District of Texas for conspiracy to import marijuana, conspiracy to possess

with intent to distribute marijuana, importation of marijuana, and possession with intent to distribute marijuana. The indictments in both the Southern and Northern District of Texas involved trials on the same marijuana conspiracy charges and grew out of a single conspiracy between Petitioner and several other persons to smuggle drugs from Mexico into the United States. The smuggling operations began in August, 1980, with a telephone conversation between Petitioner and one Howard Awalt. In both of Petitioner's trials, Awalt, an unindicted co-conspirator, was the Government's principal witness.

Petitioner's offense in the Southern District trial for importing marijuana,

21 USC §952(a), was an essential element of his felony convictions in the Northern District for violating 31 USC §1101, 1059. In charging felony violations of 31 USC §1101, the Government was required to plead that Petitioner exported currency in excess of $5000.00 without filing the required report while violating another law of the United States.

The Government charged in the Northern District indictment that the unreported currency was exported into Mexico in furtherance of the scheme to violate 21 USC §952(a).

REASONS FOR GRANTING THE WRIT

I. THE ISSUE OF WHETHER THE GOVERNMENT MAY PURSUE MULTIPLE TRIALS FOR VARIOUS

INCIDENTS IN A SINGLE DRUG CONSPIRACY WITHOUT VIOLATING THE DOUBLE JEOPARDY CLAUSE REQUIRES DETERMINATION BY THE SUPREME COURT.

It is clear from Albernaz v. United States, 450 U.S. 333 (1981) the double jeopardy clause does not preclude the Government from pursuing at a single trial multiple punishments for separate offenses arising from a single drug conspiracy. The Supreme Court has only permitted multiple convictions and punishments for the separate offenses that may arise from a single transaction or conspiracy only when they have been sought at a single trial. Missouri v. Hunter, ___ U.S. ___ (1983). However, there is no clear

pronouncement from this Court concerning whether the Government may, without violating the double jeopardy clause, seek multiple punishments at multiple trials for conduct arising out of a single conspiracy that violates several penal statutes.

Conspiracies, especially drug conspiracies, are by their nature going to involve multiple offenses. In the Judicial Districts of the United States within the Fifth Circuit, the Government seems to be pursuing a conscious policy of separating the various incidents included in drug conspiracies into multiple offenses and seeking multiple trials for the separate offenses. (See Apendix E)

This effort to exploit, what the Government accurately perceives to be a gap in the double jeopardy law is without substantive or procedural justification. At present it is solely within the Government's discretion to determine whether to bring successive prosecutions based on the same criminal actions. Unreviewed and unlimited prosecutorial discretion is especially subject to abuse. It creates the potential for prosecutions only for the purpose of harrassment and the substantial probability that an accused individual may be acquitted at one trial only to be convicted at a subsequent trial for essentially the same conduct. In the context of drug

conspiracies and similar criminal actions the collateral estoppel doctrine of Ashe v. Swenson, 397 U.S. 436 (1970) does not adequately protect against such occurrences.

Additionally, unbridled prosecutorial discretion has negative implications for the appropriate allocation of scarce judicial resources. At a time of strained and overcrowded dockets the courts should not be made to bear the burden of prosecutions made necessary only by the Government's desire to seek multiple indictments and separate trials for the same course of conduct.

The Supreme Court's previous pronouncements in this area have clearly addressed and defined the

extent of judicial discretion in imposing multiple punishments for the same criminal conduct. As the Government's actions in Petitioner's case suggest there is a substantial need for this Court to exercise its power to clarify the extent of prosecutorial discretion to pursue successive prosecutions for the same course of criminal conduct.

A. THE GOVERNMENT SHOULD BE REQUIRED TO DEMONSTRATE A COMPELLING REASON FOR SUBJECTING A PERSON TO MULTIPLE TRIALS WHEN IT FAILS TO JOIN AT ONE TRIAL ALL OF THE STATUTORY VIOLATIONS GROWING OUT OF A SINGLE COURSE OF CRIMINAL ACTIVITY.

Protection against unnecessarsy and abusive prosecutions is at the very core

of the "double jeopardy" clause. Jeffers v. United States, 432 U.S. 137, 151 (1977). The rationale underlying the clause is that the State, with all its resources and power should not be allowed to subejct an individual to the embarrassment, expense and ordeal of repeatedly defending against attempts to convict him for an offense. Green v. United States, 355 U.S. 184 (1957). The rationale is recognition of the reality that the power to prosecute involves the power to punish. Breed v. Jones, 421 U.S. 519 (1975). Allowing the Government to repeatedly try an individual without limit would allow the Government to punish without convicting. Such a power would cut deeply into the

framework of procedural protections the Constitution establishes. United States v. Jorn, 400 U.S. 470, 480 (1971).

Protection afforded by the double jeopardy clause encompasses a prohibition against allowing unlimited multiple prosecutions for separate offenses growing out of the same course of criminal activity or the same criminal transaction. Today, because of the proliferation of criminal statutes and the legislative tendency to divide the phases of a criminal transaction into numerous statutory violations, any single criminal act or course of criminal conduct provides prosecutors with the opportunity to file numerous overlapping charges based on each separate statutory violation. Under

these circumstances, a failure to prohibit unnecessary multiple trials for separate offenses committed in a single criminal transaction creates the danger of the very prosecutorial abuse the double jeopardy clause is intended to prevent.

Excepting special circumstances the Government should be required to join at a single trial all of the offenses arising out of a single criminal transaction. As pointed out in Petite v. United States, 361 U.S. 529 (1960) it has been the Government's policy to join together all offenses arising from a single transaction. However, the Government has begun, without either procedural or substantive justification

to subject defendants to the unnecessary and abusive burden of multiple prosecutions for offenses growing out of a single course of criminal activity.

The Government could have tried Petitioner for all the offenses he was charged with in a single trial. The Government had in its possession at the first trial the evidence necessary to convict Petitioner of the offenses he was convicted of at his second trial. All of the offenses charged against Petitioner were complete by the time of his first trial. If the Northern District trial court had venue to try both the marijuana conspiracy and the currency charges, then the Southern District had venue to try both sets of

charges. If the Southern District had venue to try the conspiracy which included the currency violations as an aspect of it, it also had venue to try the currency charges also. There was no procedural or substantive justification for the Government's failure to join all the offenses in one trial. Yet, it chose to indict Petitioner in two separate indictments in two separate judicial districts for offenses that were closely connected incidents of the same criminal conspiracy. The Government's actions in this matter violated Petitioner's right under the double jeopardy clause to be protected from unnecessary and abusive multiple prosecutions.

B. THE FIFTH CIRCUIT'S DEFINITION AND

APPLICATION OF THE STANDARD FOR DETERMINING WHETHER AN OFFENSE IS A LESSER INCLUDED OFFENSE OF ANOTHER IS CLEARLY IN CONFLICT WITH PRIOR DECISIONS OF THIS COURT.

Petitioner was convicted in the Southern District of Texas for importation of marijuana in violation of 21 USC §952(a). In a subsequent indictment of Petitioner in the Northern District of Texas the Government charged that Petitioner violated 31 USC §§1101, 1059 in furtherance of the marijuana importation scheme he was convicted of in the Southern District.

The established test for determining whether one offense is the lesser

included of another is whether each offense requires proof of an additional fact or element that the other does not. Blockburger v. United States, 284 U.S. 299, 304 (1932). In rendering its opinion on this issue the United States Court of Appeals for the Fifth Circuit incorrectly defined and applied the standard for determining whether an offense is the lesser included of another:

> Blockburger v. United States, 284 U.S. 299 (1932), articulated the standard for determining when a defendant is 'twice put in jeopardy.' The essential inquiry is whether the later charge contains an element not found in the earlier one.
> United States v. Borchardt, No. 82-1719 (5th Cir. Dec.20, 1983) attached, p. 8a of Appendix.

As pleaded in the Northern District

indictment the 21 USC §952(a) offense is a lesser included offense of 31 USC §§1101, 1059, because although proof of the §1101, 1059 offense required that all the elements of the §952(a) offense be shown plus the additional facts of exporting currency in excess of $5000.00 without filing a report, proof of the §952 offense required no showing of any additional facts not shown in the §§1101, 1059 offense.

Additionally, the facts of this case do not fit the typical enhancement situation as suggested by the Fifth Circuit in its opinion:

> We liken the instant facts to the typical enhancement situation which we have held does not violate the double jeopardy clause.

(Appendix, p. 10a) The violation of another law of the United States is not

a precondition for enhancing the penalty for an offense under 31 USC §§1101, 1059, it is an element of that offense.

Under the double jeopardy clause a lesser included offense is the "same offense" as the greater offense which includes it. Albernaz v. United States, supra; Illinois v. Vitale, 447 U.S. 410 (1980); Jeffers v. United States, 432 U.S. 137 (1977) and Brown v. Ohio, 432 U.S. 161 (1977). As a consequence, after a conviction for a lesser included offense, the double jeopardy clause bars a subsequent trial and conviction for the greater offense, supra. Because the 21 USC §952(a) offense is a lesser included offense of 31 USC §§1101, 1059 the Fifth Circuit should have reversed Petitioner's convictions under 31 USC

§§1101, 1059.

The lower courts are unclear in this area because of the complex nature of the current rules governing double jeopardy law and because of the proliferation of complex statutory offenses. This case presents an excellent opportunity for the Supreme Court to provide clarifying guidance.

CONCLUSION

Petitioner respectfully prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review its Judgment and Opinion.

Respectfully submitted,

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ATTORNEY OF RECORD
FOR PETITIONER
IRA EUGENE BORCHARDT

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing instrument have been served on Hon. Rex E. Lee, The Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20530 and three true and correct copies to Mr. Michael P. Heiskell, 1100 Commerce Street, Dallas, Texas 75242 by United States Mail, postage pre-paid on the 26th day of March, 1984.

STEPHEN M. ORR

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 82-1719

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

IRA EUGENE BORCHARDT, a/k/a
Ira de la Madrid, and
TERRY DON TATE,
Defendants-Appellants

Appeals from the United States
District Court for the
Northern District of Texas

(DECEMBER 20, 1983)

Before POLITZ, JOHNSON and WILIAMS,
Circuit Judges. Politz, Circuit Judge:

Terry Don Tate and Ira Eugene Borchardt appeal convictions for drug-related offenses. Finding no reversible error, we affirm.

Facts

Borchardt, Tate, Howard Eugene Awalt, and several others made plans during the summer of 1980 to smuggle drugs from Mexico to the United States. On September 19, 1980, Tate flew to Mexico carrying $100,000 in cash. He met Borchardt and they began the arrangements to purchase marihuana. During October and November both returned to Mexico with additional funds.

To secure more "financing," on

November 18, 1980, Awalt and another cohort robbed a store in Dallas of jewelry worth $300,000. Awalt agreed that the proceeds of the jewelry theft could be used to purchase cocaine for importation and Borchardt took the jewelry to Mexico.

During December the importation scheme produced its first fruit; 400 pounds of marihuana was flown from Mexico to a landing strip near Asutin. Tate rented a motor home and, accompanied by other defendants, hauled that load to Dallas. A second shipment, weighing 1100 pounds, was flown in during December, followed by an identical load in January 1981. During February 1981 a plane carrying 500 pounds of marihuana crashed from lack of fuel. The investigation of the

crash led to the indictment of Borchardt.

Meanwhile, cocaine importation had begun in January when Borchardt flew from Mexico to Dallas with a quantity of cocaine which was consumed by the sampling of Borchardt, Awalt and the other co-defendants. Several more shipments were successfully smuggled before Tate was introduced to Kenneth Lee, an undercover agent for the Drug Enforcement Agency. Tate explained the smuggling procedure to Lee, giving him a sample of the marihuana. Tate was arrested.

Borchardt was convicted in the Southern District of Texas for conspiracy to import, possess, and distribute marihuana. We affirmed.

United States v. Borchardt, 698 F.2d 697 (5th Cir. 1983). The present appeal arises out of a second trial in the Northern District of Texas in which Borchardt was convicted of possession of cocaine, 21 U.S.C. § 844(a), and failure to file the currency report required when one removes more than $5,000 from the United States, 31 U.S. C. § 1101, 31 C.F.R. §§ 103.23(a), 103.25(b). Borchardt was acquitted of conspiracy to import cocaine in the second trial.

Tate was also tried in the Northern District of Texas and was convicted of conspiracy to possess marihuana with intent to distribute, 21 U.S. C. §§ 841(a)(1), 846; failure to file the currency report, 31 U.S.C. §1101, and 31 C.F.R. §§103.23(a), 103.25(b);

possession of marihuana, 21 U.S.C. § 844(a); distribution of marihuana, 21 U.S.C. § 841(a); and using a communication facility to commit a felony, 31 U.S.C. §843(b). Tate was acquitted of the charge of conspiracy to import cocaine.

In both trials Awalt, an unindicted co-conspirator, was the principal witness for the government. In addition to transaction related federal charges, Awalt faced state charges for armed robbery in Dallas, Denton, and Tarrant counties. Awalt was charged by information and pleaded guilty to the federal charges but the state charges were not fully resolved when he testified. The court refused to permit defense counsel to use Awalt's state

indictments to refresh his memory as to certain dates or to use them to show bias. On appeal, Tate and Borchardt complain of these rulings. They also raise the issue of the possibility of perjured testimony and its wrongful admittance into evidence. Borchardt additionally urges a double jeopardy bar which we shall address first.

Double Jeopardy

Borchardt maintains that the second trial in the Northern District violated the double jeopardy clause of the fifth amendment. He contends that he was twice tried for the same offense. We do not agree. In the first trial Borchardt was charged and convicted of conspiracy to import and to possess marihuana with

intent to distribute and of the substantive offenses of importation and possession of marihuana. In the second trial, that now on appeal, he was indicted and convicted of various counts involving cocaine and one count relating to the failure to report the exporting of more than $5,000 in United States currency.

Blockburger v. United States, 284 U.S. 299 (1932), articulated the standard for determining when a defendant is "twice put in jeopardy." The essential inquiry is whether the later charge contains an element not found in the earlier one. It is immediately apparent that charges involving the controlled substance marihuana differ from charges involving the controlled substance cocaine.

Accordingly, the initial double jeopardy assessment results in a conclusion rejecting Borchardt's position.

However, Borchardt argues more. He contends that because the first conviction in the Southern District involving marihuana converts the currency violation from a misdemeanor to a felony, his fifth amendment quaranty is abrogated. We are not persuaded.

A violation of the currency export reporting statute is a misdemeanor, 31 C.F.R. § 103.49(a), unless the failure to report properly is done in conjunc tion with the violation of a federal criminal statute. Borchardt argues that Ashe v. Swenson, 377 U.S. 2136 (1970), requires the prosecutor to bring all charges growing out of a single episode

in one proceeding. That presupposes that the prosecutor may appropriately bring all charges in one proceeding. That has not been shown to be the case here. Borchardt cites Brown v. Ohio, 431 U.S. 161 (1977), as dispositive authority. We do not find it such. Brown v. Ohio does not support the proposition that one may not be charged in separate districts with separate offenses simply because all arise out of the same course of criminal conduct.

Nor are we persuaded that the double jeopardy clause proscribes the currency report charge in the second trial because the punishment is increased by the earlier conviction. We liken the instant facts to the typical enhancement situation which we have held does not

violate the double jeopardy clause. 1983). The double jeopardy claim is without merit.

State Indictments

Awalt testified that he met with Tate on November 3 and flew to Mexico with him on November 5, 1980. His testimony reflected that during the interim he had various conversations with Tate in Irving and Sulphur Springs and packed for the Mexico trip at Borchardt's home where Tate was staying. These dates coincide with the dates on the indictments returned in the state court robbery charges. Appellants sought to use the indictments to refresh Awalt's memory as to dates. We find this question and answer in the testimony:

Q. Mr. Awalt, let me show you this indictment out of Denton County for robbery there on November 18. Does that help you remember that one, and November 4, 1980, do you remember that on up in Denton County,

GOVERNMENT: Judge, I want to object to that.

A. (Awalt) No, sir, I don't.

The government's objection triggered a hearing out of the presence of the jury. The trial judge ruled that the indictments could not be used to either refresh Awalt's memory or to show his bias.

Under Rule 612 of the Federal Rules of Evidence, a witness may use a writing to refresh his memory. We agree with our colleagues of the Eighth Circuit that whether the witness has the need for the refreshing material, and whether the

material indeed performs the refreshing function are matters within the sound discretion of the trial judge. United States v. Conley, 503 F.2d 520, 522 (8th Cir. 1974). An examination of Awalt's responses, given after defense counsel noted the dates in question, reflects that Awalt did not remember the dates and simple reference to the indictment would have produced naught. We defer to the trial judge who was in position to measure the intangibles which cannot be captured and reproduced in the typed transcript before us. We find no basis for the assertion that the trial judge abused his discretion by refusing the use of the state indictments to refresh Awalt's memory.

From our perspective, the real reason

for use of the indictments was for impeachment purposes. Defense counsel readily accomplished this by inquiring:

> Q. Mr. Awalt, can you tell the jury, were those robberies being committed by you at the same time that you have told us about these events that you have testified to here yesterday and today?
>
> Yes, sir. That's correct.
>
> Q. Is it your testimony then that you would go to Mexico and come back and commit a robbery, and then go to Kenney Collins' house and then commit a robbery, or how did these fit together? How could you be so busy?

The jury was adequately apprised of this aspect of Awalt's background. There was no need for copies of the indictments.

The appellants insist the indictments were admissible to show Awalt's bias. We have stressed the importance of allowing an accused the opportunity to

cross-examine to show an adverse witness's bias, particularly if that witness is central to the government's case. United States v. Brown, 546 F.2d 66 (5th Cir. 1977). The scope and extent of that cross-examination is within the discretion of the trial judge. The basis for the bias claim, Awalt's expectation or hope that he would reap some benefits in the form of relief in the state court proceedings, was before the jury. Awalt testified:

> I have agreed to plead -- I had an agreement to plead guilty for twenty years in the Dallas courts, which I did. I also received twenty years in Fort Worth. I have pending charges in Denton County, which I have talked to officers there about those charges and there's a possibility of me pleading guilty. But I have no definite arrangement with the Denton authorities, nor have I received any time out from Denton County.

This testimony sufficiently supports the conclusion that the jury knew about the state offenses and their pending disposition. Counsel had more than adequate ammunition to argue the point to the jury. The trial court did not err in refusing to admit the indictments in evidence or to allow their use for impeachment purposes.

Finally, we address the issue of perjured testimony. The appellants maintain that the government offered, or allowed, Awalt's perjured testimony about the existence of plea bargains. The follwing colloquy, made out of the presence of the jury, ostensibly contains the perjured testimony:

Q. Mr. Awalt, did you -- when you plea bargained, did you make a deal with Mr. Potts to have the cases in Denton dismissed after this was over?
A. No, sir.

- - -

Q. Did you ever make any arrangements to dismiss cases of a similar nature, let's say, in Ft. Worth?

A. No, sir.

Q. All right. So that was part of your plea bargaining with the federal authorities, that Mr. Gerber went over there and helped you get them to dismiss the life sentence probability down to a twenty over the State court?

A. No, sir.

Q. He just spoke in your behalf?
A. Yes, sir. That was between me and Bob Gerber.

- - -

Q. Well, you made a plea bargain with the government, didn't you?

A. No, I had no plea bargain with the government.

Q. Didn't you?

A. No, I had no plea bargain with the government. I pled guilty to my federal charges, and I received a thirty year sentence.

Q. I understand. But they tried to help you?

A. There was no plea bargain.

In addition to Awalt's testimony, Robert Gerber, a United States Treasury Customs Agent, testified that he talked to the prosecutors in Dallas, Denton and Tarrant counties about the state armed robbery indictments, consistent with his agreement with Awalt. Gerber assured Awalt that he would intercede with the state authorities in order to induce Awalt to cooperate with the government in the pending federal cases. Gerber's testimony reflects his efforts to persuade the state prosecutors to accept a maximum sentence and correlate it to the federal sentence. According to Gerber, none of the three district attorneys would specifically agree to

limit Awalt's sentence exposure.

After Awalt concluded his testimony, a letter from the United States Customs Department to the Dallas County District Attorney's office was introduced into evidence. The letter reads:

> He [Awalt] has agreed to plead guilty to a specified term on armed robbery charges in Dallas County, Tarrant County, and Denton County. He has also agreed to plead guilty to a "criminal information" concerning the federal charges. In return for the guilty pleas the Dallas District Attorney, the Tarrant District Attorney, and Denton District Attorney have agreed to twenty year terms on each armed robbery charge. All sentences to run concurrent with the federal sentence and the incarceration to be at a federal institution. Arrangements along this line are being finalized with the office of the United States Attorney, Dallas.

The factual resolution of this issue is unclear but it is quite clear that Awalt, directly and through Gerber,

tried to use his cooperation with the consideration from the state authorities. The latter is the essential point in our consideration.

The appellants insist that perjured testimony was used, suggesting that the jury was misled and unable properly to evaluate Awalt's testimony. We are not convinced. Awalt admitted the state armed robbery charges as well as the state plea bargains incident to two of the charges. The government contends that Awalt never had a formal plea bargain arrangement with the federal government; that his testimony was not perjurious. We do not accept such a narrow view of Awalt's testimony and are troubled by it. However, we do not see this testimony as significantly

affecting the outcome of this case.

In United States v. Barham, 595 F.2d 231 (5th Cir. 1979), we stated that "the failure of the prosecution to correct false testimony which it knows to be false violates due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." The jury was informed that Awalt had been charged with three robberies and had pled guilty to at least two. It is apparent that his cooperation with the government was caused, at least in part, by his hope that leniency might thereby come his way. We are satisfied that this reality would not escape the average juror. It is patent. The jury had ample evidence of Awalt's position and could assess

adequately his motives for testifying. In light of the evidence in the record we are convinced that there is no "reasonable likelihood that the false testimony [if indeed it be false] could have affected the judgment of the jury."

The convictions of Borchardt and Tate are AFFIRMED.

APPENDIX B

§952. Importation of controlled substances

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, - - -

APPENDIX C

§963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX D

§ 1101. Reports

Persons required to file

(a) Except as provided in subsection (c) of this section, whoever, whether as principal, agent, or bailee, or by an agent or bailee, knowingly---

(1) transports or causes to be transported monetary instruments---

(A) from any place within the United States to or through any place outside the United States,

* * *

in an amount exceeding $5,000 on any one occasion shall file a report or reports in accordance with subsection (b) of this section.

APPENDIX E

§ 1059. Additional criminal penalty in certain cases

Whoever willfully violates any provision of this chapter where the violation is---

(1) committed in furtherance of the commission of any other violation of Federal law, * * *

shall be fined not more than $500,000 or imprisoned not more than five years, or both.

APPENDIX F

United States v. Nichols,
CR-83-166, CR-83-305 and 306,
5th Circuit No. 83-3511
currently under review by the Fifth Circuit.

United States v. Kalish,
690 F.2d 1144 (5th Cir. 1983)

United States v. Lee,
622 F.2d 787 (5th Cir. 1980)

United States v. Gonzalez,
548 F.2d 1185 (5th Cir. 1977)

RESPONDENT'S

BRIEF

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No. 83-1643

In the Supreme Court of the United States

OCTOBER TERM, 1983

IRA EUGENE BORCHARDT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conviction for failure to file a report when transporting more than $5,000 in currency outside of the United States (31 U.S.C. (1976 ed.) 1059 and 1101) is barred by the Double Jeopardy Clause because he had previously been prosecuted in a different district court for a conspiracy to violate the narcotics laws, part of which included the currency reporting violations.

2. Whether petitioner's conviction for violating 31 U.S.C. (1976 ed.) 1059 and 1101 is barred by the Double Jeopardy Clause because his previous prosecution for importing marijuana was used as the basis for converting the currency reporting offense from a misdemeanor to a felony.

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In the Supreme Court of the United States

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-22a) is reported at 723 F.2d 905 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 20, 1983. A petition for rehearing was denied on January 26, 1984. The petition for a writ of certiorari was filed on March 26, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on one count of possession of cocaine, in violation of 21 U.S.C. 844(a), and two counts of failure to report the movement of more than $5,000 from the United States, in

violation of 31 U.S.C. (1976 ed.) 1059 and 1101, 31 C.F.R. 103.23(a), 103.25(b).[1] He was sentenced to a total term of imprisonment of ten years. The court of appeals affirmed (Pet. App. 1a-22a).

1. The evidence, as reflected in the opinion of the court of appeals, was as follows. In the summer of 1980, Howard Awalt, Terry Tate and petitioner made plans to import marijuana from Mexico (Pet. App. 2a). In September 1980, Tate delivered $100,000 in cash to petitioner in Mexico, which was to be used to purchase marijuana. No currency report of the transaction was filed with the Customs Service as required by 31 U.S.C. 5316. In November 1980, petitioner and Tate again flew to Mexico, each with $10,000 in cash concealed in his boots (Pet. App. 2a). Again no currency report was filed with the Customs Service.

Using this currency and some additional money, petitioner and his co-conspirators began in December 1980 importing marijuana from Mexico. Between then and February 1981, the operation flew a total of 2,000 pounds of marijuana from Mexico into Texas (Pet. App. 2a). In addition, petitioner brought a quantity of cocaine with him on a flight from Mexico to Dallas in January 1981 (*id.* at 3a-4a).

Petitioner's scheme began to fall apart in February 1981, when an airplane carrying 481 pounds of marijuana, which he had arranged to be flown from Mexico, crashed near Raymondville, Texas (698 F.2d 697 (1983)). Soon thereafter petitioner was arrested. Subsequently, Tate discussed the marijuana importation scheme with an undercover DEA agent and was arrested after giving the agent a sample of marijuana (Pet. App. 3a).

---

[1]The monetary transaction reporting provisions of 31 U.S.C. (1976 ed.) 1059 and 1101 have been recodified without substantive change at 31 U.S.C. 5322 and 5316, respectively.

2. Petitioner was indicted and convicted first in the United States District Court for the Southern District of Texas of conspiracy to import and to possess marijuana with intent to distribute it and with the substantive offenses of importing marijuana and possessing it with intent to distribute it. His conviction was affirmed (698 F.2d 697 (1983).

Subsequently, the prosecution under review was instituted against petitioner and eight co-defendants in the United States District Court for the Northern District of Texas, charging the defendants with a substantial number of offenses arising out of allegedly different marijuana (Counts 1 and 2) and cocaine (Count 3) conspiracies. Indeed, Counts 1 and 2 of the indictment charged petitioner's co-defendants (but not petitioner) with the same conspiracy petitioner had been charged with and convicted of in the Southern District of Texas. Petitioner moved to dismiss the counts in the indictment charging him with willfully failing to file a currency report, on the ground that those charges related to activities in furtherance of the marijuana conspiracy for which petitioner had already been convicted and sentenced. The motion was denied (9/13/82 Tr. 4-6; 12/31/82 Tr. 3-8).

3. The court of appeals affirmed (Pet. App. 1a-22a). It held that the crimes charged in the two trials — conspiracy to violate the narcotics laws and currency reporting violations — clearly involved different elements and thus could be separately prosecuted under the standards in *Blockburger* v. *United States*, 284 U.S. 299 (1932) (Pet. App. 8a). It further concluded that the use of the importation conviction as a basis for converting the currency reporting violations from a misdemeanor to a felony did not violate double jeopardy (*id.* at 6a-7a). Finally, the court rejected petitioner's assertion that the government should have

prosecuted all of his crimes in a single proceeding. The court pointed out that it had "not been shown" that all charges could have been brought in one proceeding (*id.* at 9a-10a).

ARGUMENT

1. Petitioner argues (Pet. 4-9) that the Double Jeopardy Clause bars the government from proceeding with two trials in different district courts, even for distinct substantive offenses, if they arise out of the same basic conspiracy. Alternatively, petitioner asserts (Pet. 9) that the government violated the so-called *Petite* policy (see *Petite* v. *United States*, 361 U.S. 529 (1960)) by proceeding with the separate trials. Neither of these claims has merit.

Petitioner was charged in two judicial districts with distinct sets of offenses — (1) conspiracy to import marijuana and importing and possessing marijuana in the Southern District of Texas; and (2) conspiracy to import cocaine and to possess it (of which he was acquitted) and the substantive offenses in the Northern District of Texas. In the Northern District indictment, petitioner was also charged with the currency reporting offenses. The court of appeals was clearly correct that the various offenses charged involve distinct crimes and ordinarily could be charged and prosecuted separately without constitutional impediment. See *Blockburger* v. *United States*, *supra*.

Simply stated, under *Blockburger* the test is whether the elements of each offense require proof of a fact that the other does not. 284 U.S. 304. The test is designed as an aid in determining whether the legislature intended each crime to be punished separately. *Missouri* v. *Hunter*, 459 U.S. 359 (1983); *Albernaz* v. *United States*, 450 U.S. 333, 344 (1981); *Brown* v. *Ohio*, 432 U.S. 161, 165 (1977). In this case, the factual requirements of the two offenses are clearly distinct. The currency violation requires proof of the unreported transfer of money and proof that the transfer was committed

in furtherance of a violation of federal law (31 U.S.C. (1976 ed.) 1059). The various elements of the marijuana charges — importation, controlled nature of the substance, and conspiratorial agreement (21 U.S.C. 960) —are completely unrelated to the currency reporting offense, which could be established if the related crime were arson, bribery, extortion, fraud, or any number of other crimes.

Petitioner is correct that it is the government's policy, when feasible, to try all related offenses in a single trial. But that policy was not violated here; petitioner's various offenses could not all be tried in a single district. It is true that petitioner could have been tried in the Northern District for the marijuana conspiracy and the currency reporting violation, but it is doubtful that he could have been charged there with the substantive marijuana importation and possession charges. The marijuana-laden aircraft that crashed in 1981 did so in the Southern District of Texas, where Raymondville is located, and never reached or passed through the Northern District.

On the other hand, petitioner could not have been charged with the currency reporting violations in the Southern District. Those offenses were committed in Dallas, which was where the filing of the reporting form with Customs was required before petitioner and Tate left on their flights to Mexico. Accordingly, venue for the substantive offenses lay in different districts, and thus petitioner necessarily faced two trials in separate districts. He has alleged no reason why the marijuana conspiracy had to be tried jointly with the currency reporting violation rather than with the importation and possession offenses, and we know of none. Accordingly, the separate prosecutions in this case did not violate either the Double Jeopardy Clause or the *Petite* policy.

2. Petitioner argues (Pet. 10-11) that his importation conviction (21 U.S.C. 952(a)) in the Southern District was a lesser included offense of the currency reporting violation charged in the Northern District and therefore he could not be tried separately for the latter. The use of the related marijuana importation conviction to convert the reporting offense into a felony does not violate double jeopardy where, as here, the two prosecutions could not have been brought in the same district. It is quite clear that petitioner could be sentenced separately for the importation offense and the currency violations, even if the latter were charged as felonies on the basis of their relation to the former, because Congress in enacting those statutes clearly intended for both the imitial offense and the conversion portion of the subsequent offense to be punishable cumulatively. Cf. *Sudds* v. *Maggio*, 696 F.2d 415 (5th Cir. 1983).

It is true, of course, that even though two crimes can be punished cumulatively, the government may still be required, when possible, to prosecute the crimes together. See *Harris* v. *Oklahoma*, 433 U.S. 682 (1977); *Brown* v. *Ohio*, 432 U.S. 161 (1977). It was not possible, however, to do that here. As we have explained, the importation offense was committed in the Southern District and the currency offense was committed in the Northern District. Accordingly, the government was justified in prosecuting the two crimes separately. Cf. *Diaz* v. *United States*, 223 U.S. 442 (1912) (subsequent prosecution for murder after prosecution for assault not barred because murder could not be charged at first trial since victim had not died).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1984

DOJ-1984-06

OPINION

SUPREME COURT OF THE UNITED STATES

IRA EUGENE BORCHARDT *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 83-1643. Decided October 29, 1984

The petition for a writ of certiorari is denied.

JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting from denial of certiorari.

The petitioner Ira Borchardt challenges a judgment of the Fifth Circuit affirming his felony conviction for violations of the currency laws. A federal jury sitting in the Northern District of Texas found that Borchardt smuggled large sums of currency out of the country in furtherance of an illegal scheme to purchase and import marihuana from Mexico. Borchardt contends that, because he already had been convicted of conspiracy-to-import charges by a federal jury sitting in the Southern District of Texas, the Northern District prosecution and conviction for the currency offenses violated his right under the Fifth Amendment's Double Jeopardy Clause not to be tried successively for the same criminal acts. The Government responds that (1) there was no double jeopardy violation; and (2) in any event, Borchardt's Sixth Amendment venue rights precluded the joinder of all charges at a single trial.

I believe this case presents an important question whether the second prosecution and conviction impermissibly rest on criminal acts that formed the basis of Borchardt's first conviction. I also believe the case presents an important question whether the government improperly has exploited Borchardt's venue rights to defeat his right otherwise to be secure from repetitious prosecutions for the same criminal acts. The venue issue, in particular, is a substantial federal question that is likely to recur with frequency. I therefore respectfully dissent from the Court's denial of certiorari.

I

Borchardt began to conspire with several other individuals in August 1980 to import marihuana from Mexico into the Dallas-Fort Worth area, which is in the Northern District of Texas. Twice that autumn, Borchardt and his co-conspirators surreptitiously flew a total of $126,000 from the Dallas-Fort Worth Airport to Mexico City for the purpose of purchasing marihuana. Borchardt spent much of the next several months in Mexico making preparations to transport the purchases back into the Dallas-Fort Worth area. Between December 1980 and February 1981, he arranged for three airplane flights that carried a total of approximately 2,600 pounds of marihuana. The scheme began to unravel when, during the third flight on February 22, 1981, the airplane encountered bad weather, ran out of fuel, and crash-landed outside the town of Raymondville, which is in the Southern District of Texas. Borchardt, who had remained behind in Mexico, returned to this country and was arrested shortly thereafter.

The United States Attorney for the Southern District of Texas obtained an indictment in December 1981. Borchardt was charged with importing marihuana into the Southern District on February 22, 1981, and with constructively possessing marihuana on that date with the intent to distribute it. He also was charged with conspiring, "from on or about November 1, 1980, to on or about February 26, 1981," to import, possess, and distribute marihuana. 1 Record 27. The conspiracy charges against Borchardt rested on his role in smuggling the currency into Mexico on the two occasions discussed above, his supervision of the shipments from Mexico, and his participation in various planning meetings and telephone conferences. The jury convicted Borchardt on all counts, and the District Court sentenced him to ten years in prison. The Court of Appeals for the Fifth Circuit affirmed

the conviction. *United States* v. *Borchardt*, 698 F. 2d 697 (1983).

In July 1982, shortly after Borchardt's conviction in the Southern District, the United States Attorney for the Northern District of Texas obtained a second indictment relating to the importation conspiracy. Borchardt was charged with two counts of violating the currency laws; these counts represented the two occasions he had smuggled currency into Mexico.[1] Specifically, the indictment charged that Borchardt on these two occasions had violated 31 U. S. C. § 1059 (1976 ed.), which proscribed the willful failure to file currency reports when taking money out of the country "where the violation is . . . *committed in furtherance of the commission of any other violation of Federal law* . . ." (emphasis added).[2] The Northern District indictment charged that Borchardt had violated the currency-reporting requirements "in fur-

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[1] Borchardt also was charged with two cocaine offenses, and the jury ultimately convicted him of one count of possessing cocaine. He received a two-year sentence for this offense, to be served consecutively to the currency sentences discussed at *infra* at 4. The cocaine conviction is not infirm on double jeopardy grounds. Although Borchardt argues that the cocaine and marihuana offenses were but segments of an over-arching continuing conspiracy to import drugs, and therefore should have been tried together, the Government's proof on the cocaine charge rested on entirely different overt acts from the marihuana and currency charges.

[2] Later in 1982, this provision was amended and recodified at 31 U. S. C. § 5322(b), which now prohibits the willful failure to file the required reports "while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period . . . ." Borchardt's duty to file a currency report arose from 31 U. S. C. § 1101(a)(1)(A) (1976 ed.), which provided that anyone who knowingly "transports or causes to be transported monetary instruments . . . from any place within the United States to or through any place outside the United States, . . . in an amount exceeding $5,000 on any one occasion" must file a report thereof. This provision has been recodified without substantive change at 31 U. S. C. § 5316. See also 31 CFR § 103.25(b) (1984) (providing for the filing of such reports "with the Customs officer in charge at any Customs port of . . . departure").

therance of . . . the illegal importation of marijuana." 1 Record 10–11.

Borchardt moved to dismiss the second indictment. *Id.*, at 24; see also *id.*, at 294. He argued that his currency smuggling already had been used in the Southern District trial to obtain his conviction for conspiracy to import and distribute marihuana, that a second trial would require the same evidence concerning the same acts as had been elicited at the first, and that to obtain a conviction under § 1059 the Government would have to retry the underlying felonies that he had been convicted of only months before. The District Court denied Borchardt's motion. 3 Record 26; 11 Record 3–4. The jury convicted Borchardt of both counts, and the Court sentenced him to consecutive sentences of four years for each violation, to be served consecutively to the sentence he was serving for the conviction in the Southern District of Texas. The Fifth Circuit affirmed in an unpublished opinion, No. 82–1719 (Dec. 20, 1983), and denied panel rehearing and rehearing en banc.

II

This case does not implicate the acknowledged power of the Federal Government to seek, *at a single criminal trial*, separate and consecutive punishments for various aspects of a single criminal act. See, *e. g.*, *Albernaz* v. *United States*, 450 U. S. 333 (1981). Rather, it presents the "entirely different constitutional issue" whether such multiple punishments may be obtained through "multiple *prosecutions* of the same offenses." *Abbate* v. *United States*, 359 U. S. 187, 198 (1959) (separate opinion of BRENNAN, J.) (emphasis added). I adhere to my view that the Double Jeopardy Clause of the Fifth Amendment requires that, except in extremely limited circumstances not present here, "all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction" be prosecuted in one proceeding. *Ashe* v. *Swenson*, 397 U. S. 436, 453–454 (1970) (BRENNAN, J., concurring). See also *Thompson* v. *Oklahoma*, 429 U. S. 1053 (1977) (BRENNAN, J., dissenting), and cases collected therein.

In the instant case, the Federal Government in the Southern District marshalled an array of evidence to demonstrate that Borchardt had twice smuggled currency out of the country, and it used these episodes along with evidence of other conspiratorial acts to obtain Borchardt's conviction for conspiring to violate, *inter alia*, 21 U. S. C. § 952(a) (importation of controlled substances). Thereafter, in the Northern District trial, the Government again marshalled its array of evidence to demonstrate again that Borchardt had participated in the two smuggling episodes and that he had done so for the purpose of violating 21 U. S. C. § 952(a). Thus the Government twice prosecuted Borchardt for the identical criminal acts, which in my view was in palpable violation of the Double Jeopardy Clause.[3]

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[3] A majority of the Court continues to apply the "same evidence" test in determining whether successive prosecutions are constitutional, tempered only by application of the collateral estoppel doctrine. See, *e. g.*, *Ashe* v. *Swenson*, 397 U. S. 436 (1970). Under this approach, the inquiry "is whether each [statutory] provision requires proof of a fact which the other does not." *Blockburger* v. *United States*, 284 U. S. 299, 304 (1932). The constitutionality of Borchardt's currency conviction is highly suspect even under this line of analysis. Borchardt was convicted in the Southern District of both importing and conspiring to import marihuana in violation of, *inter alia*, 21 U. S. C. § 921(a). He thereafter was convicted in the Northern District of violating 31 U. S. C. § 1059 (1976 ed.) on the basis of proof that he (1) willfully failed to file the required currency reports, in furtherance of (2) importing marihuana in violation of 21 U. S. C. § 921(a). The second conviction rested on an element not necessary to the first conviction (willful failure to file reports), but the first conviction did not rest on any elements that the Government did not also have to prove the second time around. "[A] person [who] has been tried and convicted for a crime which has various incidents included in it, . . . cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offence." *In re Nielsen*, 131 U. S. 176, 188 (1889). The reverse is of course also true: a person who has been tried for an offense consisting of certain elements cannot thereafter be tried for an offense consisting of the same

III

The Government appears to concede that the second prosecution would normally violate, at the very least, its *Petite* policy of trying all related offenses in a single trial. Brief in Opposition 4–5; see *Petite* v. *United States*, 361 U. S. 529 (1960).[4] But it insists that such joinder was impossible here because neither the Southern District nor the Northern District had venue to try all the offenses. Specifically, the Government contends that the two substantive offenses of importation and possession with intent to distribute, which grew out of the presence of the marihuana on Southern District soil after the plane crash on February 22, had to be tried in the Southern District. On the other hand, because the currency offenses occured at Borchardt's port of departure at the Dallas-Fort Worth Airport, see n. 2, *supra*, only the Northern District had venue to try these crimes. The Government concedes that Borchardt could have been tried on the all-embracing conspiracy charges in the Northern District, but because he already "necessarily faced two trials in separate districts," it contends, there was no logical reason why

elements plus others. See, *e. g.*, *Illinois* v. *Vitale*, 447 U. S. 410, 421 (1980); *Brown* v. *Ohio*, 432 U. S. 161 (1977).

The Government contends, however, that the "same evidence" test is not met here because the underlying felony required for conviction under 31 U. S. C. § 1059 (1976 ed.) could have been any one of numerous felonies other than the importation of marihuana. "The various elements of the marijuana charges . . . are completely unrelated to the currency reporting offense, which could be established if the related crime were arson, bribery, extortion, fraud, or any number of other crimes." Brief in Opposition 5. We rejected just such a facile construction of felony-murder statutes in *Harris* v. *Oklahoma*, 433 U. S. 682 (1977); see also *Illinois* v. *Vitale*, *supra*, at 420–421, and should do so here as well.

[4]The Government has long represented to the Court that it adheres to a policy that "several offenses arising out of a single transaction should be alleged and tried together and should not be made the basis of multiple prosecutions, a policy dictated by considerations both of fairness to defendants and of efficient and orderly law enforcement." *Petite* v. *United States*, 361 U. S. 529, 530 (1960).

the conspiracy charges had to be tried with the currency charges rather than with the posssession charges. Accepting *arguendo* the Government's contention that venue for the possession and currency offenses initially rested in separate districts,[5] this analysis nevertheless fails for two reasons.

A

First, that Borchardt already faced trial in the Southern District on the substantive possession charges could not serve to justify separate trials on the conspiracy and currency charges. The Double Jeopardy Clause does not of course shield a defendant against separate trials for separate criminal acts, but only against separate trials growing out of the same criminal acts. Prosecution for the substantive possession charges alone would not have barred a subsequent prosecution on the currency charges, because the two crimes were based on different episodes. The former charges did not rest in any way on Borchardt's earlier smuggling of

[5]The Government suggests only that it is "doubtful" whether the importation and possession charges arising out of the plane crash could have been brought in the Northern District. Brief in Opposition 5. The record, however, appears to indicate otherwise. Borchardt did not accompany the plane from Mexico, so he never *actually* possessed marihuana in the Southern District. The Government's case rested instead on *constructive* possession and importation. As the Fifth Circuit summarized, "Borchardt's participation in the venture in loading the marijuana and the calls to him *and his activities after the crash* would permit the jury to infer that he had constructive possession of the marijuana." *United States* v. *Borchardt*, 698 F. 2d 697, 703 (1983) (emphasis added). The record shows that these post-crash activities occured in the Northern District of Texas. See 1 Record 6. On the Government's own evidence, Borchardt took steps to retain dominion and control over the marihuana while he was in the Northern District, so venue would appear to lie in that district for the continuing-offense possession and importation charges. See, *e. g.*, *United States* v. *Brantley*, 733 F. 2d 1429, 1433–1435 (CA11 1984); *United States* v. *Brunty*, 701 F. 2d 1375, 1382 (CA11), cert. denied, 464 U. S. —— (1983). See also 18 U. S. C. § 3237(a) ("[A]ny offense . . . may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.").

money out of the country, but rather on Borchardt's constructive possession of the marihuana on the crashed plane, *i. e.*, on evidence that Borchardt had loaded the plane and thereby intended to exercise dominion and control over its cargo. See n. 5, *supra*.

The conspiracy and currency prosecutions, on the other hand, were largely of a piece because they rested on the same criminal episodes. The Government's decision to prosecute Borchardt for conspiracy based in part on his acts of smuggling currency necessarily triggered Borchardt's Fifth Amendment right not to be put into jeopardy again, on whatever theory of liability, for his commission of those same acts. As the Government concedes, the conspiracy and currency charges easily could have been consolidated in the Northern District. Having made its decision to prosecute Borchardt's acts of smuggling currency to obtain the conspiracy conviction in the Southern District, however, the Government should not now be permitted to bootstrap its way around the Double Jeopardy Clause by pointing to the pendency of other charges in the Southern District that bore no double jeopardy relation to the currency charges.

Petite v. *United States*, 361 U. S. 529 (1960), is squarely on point. There Petite had been convicted in the Eastern District of Pennsylvania for conspiring to make false statements to Government agencies on two occasions, once in Philadelphia and once in Baltimore. Petite subsequently was convicted in the District of Maryland on substantive charges growing out of the same Baltimore agency proceedings. We remanded the case to the Court of Appeals to vacate the judgment after the Government candidly conceded that the second trial violated the Government's own policy against repetitious prosecutions for crimes growing out of a single transaction. *Id.*, at 530–531. Although the Court avoided the constitutional issue, three of us went on to emphasize that "the Double Jeopardy Clause of the Fifth Amendment

was an insurmountable barrier to this second prosecution." *Id.*, at 533 (BRENNAN, J., joined by Black and Douglas, JJ.).[6]

B

Even if the conspiracy charges could only have been brought in the Southern District, however, I believe that the Government fundamentally misperceives the relationship between a defendant's venue rights and his double jeopardy rights. The Sixth Amendment guarantees that an accused "shall enjoy the right to a speedy and public trial . . . [in the] district wherein the crime shall have been committed." Because the venue provision was designed primarily to safeguard a defendant's rights,[7] it is one that a defendant may

[6] Of course, if the Government in *Petite* had tried the conspiracy charges in the District of Maryland and had relied on the Philadelphia false statements to obtain the conspiracy conviction, it could not thereafter have prosecuted Petite in the Eastern District of Pennsylvania for making the false Philadelphia statements. Similarly, if the Government in the instant case had prosecuted the conspiracy and currency offenses together in the Northern District of Texas and had relied on the February 22 importation and possession outside of Raymondville to obtain the conspiracy conviction, it could not thereafter have prosecuted Borchardt for the substantive offenses in the Southern District. It might be argued that these results unjustly prevent the Government from fully presenting all evidence of a conspiracy when venue problems preclude it from joining all underlying substantive offenses to the conspiracy prosecution; in such situations, it would be argued, the Government must choose between the equally unattractive options of (a) presenting evidence of all the underlying acts in the conspiracy prosecution, thereby forfeiting the opportunity to secure a subsequent conviction on the underlying substantive offense in a district with proper venue, *or* (b) withholding evidence of certain acts from the conspiracy prosecution, thereby preserving a subsequent prosecution for the underlying offense but risking a verdict of not guilty on the conspiracy charge for lack of sufficient evidence. The procedure outlined in Part III–B, *infra*, however, provides a full and efficient method for the Government to preserve its opportunity to prosecute for all offenses *and* to present its full array of evidence.

[7] "The provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prose-

waive in appropriate circumstances. See *Singer* v. *United States*, 380 U. S. 24, 35 (1965); see also Fed. Rule Crim. Proc. 21(b) ("For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.").

If the Government simultaneously had secured indictments against Borchardt in the Northern and Southern Districts, he could have waived venue in one of the districts pursuant to Rule 21(b), obtained a joinder of the two prosecutions, and thereby vindicated his right not to be tried twice for the same criminal episodes. Borchardt was not accorded this opportunity, however, because the United States Attorney for the Northern District of Texas waited until several months *after* Borchardt's conviction in the Southern District before bringing the currency charges. The Government has suggested no reason for this delay.[4]

The Double Jeopardy Clause guarantees that all charges arising out of the same criminal act will be brought *both* at the same time *and* in the same proceeding. In some situations the Sixth Amendment's venue safeguards will prevent the Government from bringing all charges in one district, but this should not serve to excuse the Government's obligation under the Fifth Amendment to bring the charges at the same time. The defendant at the very least is entitled to be "informed at one time of all the charges on which he will actually be tried," *Ashe* v. *Swenson*, 397 U. S. 436, 455 n. 11 (1970) (BRENNAN, J., concurring), so that he has a full opportunity

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cuted in a remote place." *United States* v. *Cores*, 356 U. S. 405, 407 (1958).

[4] All of the evidence the Government relied upon in the second trial was available at the time of the first indictment, as witnessed by the Government's use of the currency episodes to prove the importation conspiracy. Thus this is not a case where, despite diligent efforts, the Government had not assembled the evidence necessary to prove its second case at the time the first was initiated. See, *e. g.*, *Diaz* v. *United States*, 223 U. S. 442, 448–449 (1912).

to choose between his right to venue in separate districts and his right to a single trial on all related charges. The Government's alternative argument—that a federal prosecutor may in his own discretion choose to use a defendant's venue rights to defeat the double jeopardy safeguard—lacks any principled foundation. For whether a defendant is tried successively for the same acts in the same judicial district or in separate districts, "[r]epetitive harassment in such a manner goes to the heart of the Fifth Amendment protection." *Abbate* v. *United States*, 359 U. S. 187, 200 (1959) (separate opinion of BRENNAN, J.). Whether they occur in one district or in several districts, repetitious prosecutions for the same acts enable the Government to "wear the accused out by a multitude of cases with accumulated trials." *Palko* v. *Connecticut*, 302 U. S. 319, 328 (1937). Both sorts of prosecutions enable the Government "with all its resources and power . . . to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . . ." *Green* v. *United States*, 355 U. S. 184, 187 (1957). Both should be subject to equal condemnation under the Double Jeopardy Clause.

It might be argued that the Southern District of Texas and the Northern District of Texas are separate judicial districts, and that the Double Jeopardy Clause should not extend to require coordination among federal prosecutors acting independently in separate districts. This objection, grounded on notions of bureaucratic autonomy, is thoroughly unpersuasive. The federal districts are not separate sovereign entities, but merely adjuncts of one federal sovereign. We repeatedly have held that a sovereign government may not structure its judicial and prosecutorial systems so as otherwise to defeat the safeguard against double jeopardy. See, *e. g.*, *Robinson* v. *Neil*, 409 U. S. 505 (1973) (rejecting "dual sovereignty" doctrine with respect to separate state and

municipal prosecutions); *Waller* v. *Florida*, 397 U. S. 387 (1970) (same); *Grafton* v. *United States*, 206 U. S. 333 (1907) (same with respect to separate federal and territorial prosecutions). Similarly, where different prosecutions grow out of the same criminal act and would therefore otherwise be subject to the Double Jeopardy Clause, a sovereign should not be able to regulate the *timing* of those prosecutions in different districts so as to defeat a defendant's right to seek a single consolidated trial.

Such a rule would not impose undue hardship on federal prosecutors. It would merely require that the Government coordinate its prosecutions of individuals in different districts in such a way that the individuals were not forced to travel from district to district defending against "[r]epetitive harassment," *Abbate* v. *United States*, *supra*, at 200 (separate opinion of BRENNAN, J.), for the same criminal acts. Whether it results from an intent to harass, simple caprice, or a breakdown in communications among federal prosecutors, the Government's failure to coordinate its caseload cannot be allowed to undermine a defendant's ability to avoid double jeopardy.

Accordingly, this case presents the question whether we should hold that where multiple charges would otherwise be required to be brought in a single proceeding but for problems of venue among the judicial districts of one sovereign government, the Double Jeopardy Clause nevertheless requires the sovereign to bring all such charges within a reasonable time of each other.[9] In this way, the defendant

[9] It is of course difficult for the Government to coordinate the bringing of charges in different districts with chronometric precision. Delays might result, for example, from backlog, from the differing schedules of grand juries in separate districts, and so forth. Even after two prosecutions are brought, further delays might sometimes be encountered in transfering and consolidating the cases for trial. Some room for reasonable flexibility should therefore be accorded the Government, and in instances of such reasonable delay a defendant might have to postpone his exercise of speedy-trial rights to accomodate the joinder of all offenses against him in a single proceeding. Requiring such accomodation is reasonable. Under the federal Speedy Trial Act, for example, courts may exclude in computing the time within which a trial must commence any delay resulting from, *inter alia*, "any proceeding relating to the transfer of a case . . . from another district under the Federal Rules of Criminal Procedure" and any "continuance granted by any judge . . . at the request of the defendant or his counsel." 18 U. S. C. §§ 3161(h)(1)(G), 3161(h)(8)(A). In all instances the inquiry must be whether the delay is reasonable and whether the Government has so coordinated its interdistrict prosecutions so as to permit the defendant meaningfully to exercise his right to seek a transfer and joinder of charges in one proceeding.

would be able to seek to transfer the proceedings against him and to consolidate all charges for one trial, thereby vindicating his right under the Double Jeopardy Clause to be secure from successive prosecutions for the same criminal conduct."[10]

In the instant case, Ira Borchardt was prosecuted in one district for conspiracy to import marihuana, largely on the basis of his efforts to smuggle money out of the country to facilitate the purchase and importation of the substance. Immediately thereafter he was prosecuted again, this time for currency violations. Once again, Borchardt's conviction was grounded on his efforts to smuggle currency out of the country in furtherance of the conspiracy. But for asserted problems of venue, the Government should have been required to bring these charges in a single indictment. See Part II, *supra*. For whatever reason, the Government instead timed its interdistrict prosecutions of Borchardt so as

[10] Fed. Rule Crim. Proc. 21(b) gives the district court discretion whether to permit a transfer to another district. Where a defendant seeks a transfer to protect against double jeopardy, his interest in securing a transfer would approach its zenith and the district court's discretion accordingly would be narrowly circumscribed. There is no need here to decide whether the "interests of justice" could ever lead a court in the reasonable exercise of its discretion to deny a transfer in such circumstances. Even where there is room for discretion, however, it is important in the context of the Double Jeopardy Clause that "the decision on whether charges are to be tried jointly or separately . . . rest with the judge rather than the prosecutor." *Ashe* v. *Swenson*, 397 U. S. 436, 455 n. 11 (1970) (BRENNAN, J., concurring) (*re* discretionary exercise of Rule 14 authority).

to deny him his right to seek a consolidation of these charges under Rule 21(b), thereby stripping him of the only effective means to invoke his rights under the Double Jeopardy Clause and to seek to have all charges arising out of the currency smuggling resolved in a single trial.

Accordingly, I would grant the petition for certiorari.